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In The

Supreme Court of the United States

CYNTHIA ANDREWS, *et vir, et al.*,

Petitioners,

v.

VERMONT DEPARTMENT OF EDUCATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

RESPONDENT VERMONT DEPARTMENT OF EDUCATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the United States Constitution require a Vermont public school district to make direct and unrestricted payments of tuition to a pervasively sectarian school for a religious education?

2. Does the Free Speech Clause of the United States Constitution require a Vermont public school district to make direct and unrestricted payments of tuition to a pervasively sectarian school for a religious education?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Vermont Department of Education, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Vermont Supreme Court, issued on June 11, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1-63, reported in *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. 97-275, 1999 WL 378244 (Vt. June 11, 1999).

STATEMENT OF THE CASE

The State of Vermont requires each public school district to provide a secondary education to its students unless the district has been organized to provide only an elementary education. *See* VT. STAT. ANN. tit. 16, § 822(a) (1989 & Supp. 1998). The State of Vermont allows its public school districts to choose among several different options to satisfy this requirement. A public school district may maintain its own public high school, *see id.*, or it may pay tuition "to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state." *Id.* § 822(a)(1) (Supp. 1998).[1]

[1] In addition, a public school district may designate an approved independent school, not managed by it, as its high school. *See* VT. STAT. ANN. tit. 16, § 827(a) (Supp. 1998). It also can form a union school district and operate a high school with other public school districts. *See id.* §§ 701-723 (1989 & Supp. 1998). Finally, in certain circumstances, a public school district may choose to maintain a high school while tuitioning some students to a public or private school. *See id.* § 822(c) (Supp. 1998).

Chittenden Town School District, the public school district for children whose parents or guardians reside in the Town of Chittenden, does not maintain its own high school. Instead, it has historically provided for secondary education of its students by paying tuition, pursuant to title 16, section 822(a)(1) of the Vermont Statutes, to various public and independent secondary schools. Until the 1996-1997 school year, the Chittenden School Board authorized the payment of tuition to public high schools or approved nonsectarian secondary schools. In 1996, however, the board decided to allow tuition to be paid, as well, to approved independent sectarian schools, including Mount Saint Joseph Academy ("MSJ"), a parochial high school in Rutland, Vermont.

MSJ is a pervasively sectarian school. *See* Stipulation Regarding Facts of the Case ¶ 54, reprinted, in relevant part, in the Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Resp't Opp'n App."), 3; *see also Chittenden Town Sch. Dist.* at Pet. App., 3-5. In addition, MSJ's revenues are commingled in one bank account, from which MSJ pays all of its operating expenses. *See* Stipulation Regarding Facts of the Case ¶ 83 at Resp't Opp'n App., 3-4; *see also Chittenden Town Sch. Dist.* at Pet. App., 12.

At the time of its decision to pay tuition to MSJ, the Chittenden Town School District funded secondary education through a combination of revenues raised by a local property tax and state-aid-to-education payments

received from Vermont.[2] When the school board voted to allow tuition reimbursement to MSJ, Vermont's Commissioner of Education withheld the Chittenden Town School District's state-aid-to-education payments. The school district then filed suit against respondent in Rutland Superior Court claiming, *inter alia*, that tuition reimbursement to MSJ was constitutional and seeking an order to restore state-aid funding. Respondent counterclaimed that the school district's decision violated the Establishment Clause of the First Amendment to the United States Constitution and Chapter I, Article 3 of the Vermont Constitution.

The superior court allowed two groups of individuals to intervene in the action. One group, consisting of parents, residing in the Town of Chittenden, who sent their children to MSJ for secondary education and who sought payment of the MSJ tuition by the school district, aligned themselves with the Chittenden Town School District. The other group, consisting of residents of the Town of Chittenden who opposed the use of their state and local tax payments to fund sectarian education, aligned themselves with respondent.

The parties submitted this case to the superior court on stipulated facts. The superior court concluded on the merits that "tuition payments from a school district to

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[2] Following the Vermont Supreme Court's decision in *Brigham v. Vermont*, 692 A.2d 384 (Vt. 1997), the Legislature replaced the school finance system with one that provides for funding through the combination of a state-wide property tax and equalized, optional local property taxes. *See* VT. STAT. ANN. tit. 16, §§ 4000-4029 (Supp. 1998).

pervasively sectarian high schools, or the parents of the children who attend, would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions." *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. 20478-96 RcC (Rutland Super. Ct. June 27, 1997) at Pet. App., 114-15.

On appeal from the superior court to the Vermont Supreme Court, Chittenden Town School District and petitioners argued that (1) tuition payment to MSJ does not violate either the United States Constitution or the Vermont Constitution because it is based on a parent's free choice of educational provider, and (2) reversal of the school district's decision to pay tuition to MSJ would violate the Free Exercise Clause of the First Amendment to the United States Constitution. On June 11, 1999, the Vermont Supreme Court affirmed the superior court's decision. The Vermont Supreme Court concluded that the Compelled Support Clause of Chapter I, Article 3 of the Vermont Constitution prohibited "the Chittenden Town School District tuition-payment policy to the extent it authorizes tuition reimbursement to sectarian schools without appropriate restrictions." *Chittenden Town School Dist.* at Pet. App., 54-55. The Vermont Supreme Court further concluded that the Free Exercise Clause of the United States Constitution was not implicated because "today's ruling requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government." *Id.* at Pet. App., 54 (quoting *Sherbert v. Verner*,

374 U.S. 398, 404 (1963)). Based on this decision, petitioners filed their Petition for Writ of Certiorari.[3]

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Vermont Supreme Court's decision in this case. First, the issues the petitioners wish to present to the Court are not properly framed in the record. Second, and more fundamentally, this Court and the lower courts have clearly and unequivocally stated that direct subsidies to pervasively sectarian schools for religious education are unconstitutional. Finally, this Court has never suggested that the exercise of a constitutional right requires public subsidization.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUES ARE NOT PROPERLY FRAMED.

A. FREE EXERCISE OF RELIGION

Petitioners ignore a fundamental deficiency in the record. While petitioners allege that their constitutionally guaranteed right to the free exercise of religion was abridged by respondent, they fail to claim in their petition and failed to prove in the courts below that sending their children to MSJ was mandated by their religion. "The free exercise inquiry asks whether government has

[3] The Chittenden Town School District has not joined with the petitioners in this Petition.

placed a substantial burden on the observation of a central religious belief or practice . . . . " *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *see also Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (to succeed on a Free Exercise claim, aggrieved party's religious belief must not be "merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living").

While two petitioners did state that they were sending their children to MSJ for religious reasons,[4] none of the petitioners claimed below nor do they claim now that they chose MSJ because of a central religious belief or practice or because the Catholic church mandated such an education. *See* Stipulation Regarding Facts of the Case ¶¶ 21-28 at Resp't Opp'n App., 2-3. This Court need not consider alleged violations of religious rights where it is less than clear that religion is actually at issue.

B. FREE SPEECH

Petitioners' Free Speech claim was neither properly presented to the Vermont Supreme Court nor addressed by the *Chittenden Town Sch. Dist.* decision. This Court has consistently held that:

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[4] Petitioner Sherrie D. LaFemina stated that she "chose Mount Saint Joseph's Academy for her daughter because of her religious beliefs." Stipulation Regarding Facts of the Case ¶ 21 at Resp't Opp'n App., 2. Petitioner Robert Kirn stated that "[a]s a Catholic, MSJ's Catholic basis was also very important to him." Stipulation Regarding Facts of the Case ¶ 25 at Resp't Opp'n App., 2.

> [w]ith 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)). Furthermore, this Court has placed the burden on the aggrieved party to show that the issue was properly presented to the court below. *See Adams*, 520 U.S. at 86 ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented.").

The Vermont Supreme Court did not expressly decide whether the respondent's refusal to subsidize a sectarian school infringed on petitioners' Free Speech rights. Moreover, petitioners failed to properly present this issue to the court below. Petitioners never raised their Free Speech claim in their principal brief. In their reply brief, which focused mainly on state constitutional claims and their Free Exercise and Establishment Clause claims, petitioners included a section entitled: "The Department's Attempt to Limit and Control Expression Undermines Key Constitutional Values, Structures and Relationships in Violation of the First Amendment." *See* Intervenors-Appellants' Reply Br., reprinted, in relevant part, at Resp't Opp'n App., 6. The discussion that followed, however, was both confusing and convoluted, *see* Intervenors-Appellants' Reply Br. at Resp't Opp'n App., 5-11, and concluded with the petitioners' request that the Vermont Supreme Court: (1) "make clear to the Department that it

has no power to determine whether payment of tuition would offend the Establishment Clause;" and (2) "uphold the entirely neutral [s]tatute as [w]ritten, and the rights of all parents to make their own genuinely independent and private choices." Intervenors-Appellants' Reply Br. at Resp't Opp'n App., 10-11 (citations omitted). In sum, petitioners failed to present this issue with "fair precision," *Adams*, 520 U.S. at 87, and thus, this Court need not consider petitioners' Free Speech claim.

II. THE VERMONT SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

In developing its First Amendment jurisprudence over the past thirty years, this Court has focused on the specific feature of the particular government action before it, while cautioning that the Court's precedents remain intact unless directly overruled. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). All the while, the Court has consistently and clearly stated that neither the Establishment Clause nor the Free Exercise Clause requires direct governmental financial subsidies to a sectarian school for a religious education. The invalidity of direct payments to religious schools for a religious education has never been questioned.

In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court struck down direct unrestricted grants to sectarian schools pursuant to the Establishment Clause. *See id.* at 774-76. In *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976), this Court reiterated that:

> [t]he State may not . . . pay for what is actually religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Id. at 747. In *Mueller v. Allen*, 463 U.S. 388 (1983), while upholding tax deductions for actual expenses incurred for tuition, textbooks and transportation of dependents attending private sectarian as well as private secular and public schools, the Court contrasted this form of aid with the direct transmission of subsidies from the state to sectarian schools. The Court considered the latter form of aid to be invalid. *See id.* at 399 & n.11. In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), in upholding financial vocational assistance to a blind person at a religious college, the Court again emphasized that it is well-established "that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 (1985)).

Likewise, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), in upholding the provision of a sign language interpreter for a student at a religious school, the Court noted that such services were not a direct financial support to a pervasively sectarian institution. *See id.* at 12-13. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court upheld the expenditure of school money to pay an independent contractor to print a student religious newspaper. The Court, however, "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian

institutions." *Id.* at 842. In a concurring opinion, Justice O'Connor reiterated that the Court's decisions "provide no precedent for the use of public funds to finance religious activities." *Id.* at 847 (O'Connor, J. concurring). Finally, this Court's decision in *Agostini* dealt with the provision of supplemental, remedial instruction – secular in nature – to private and parochial school students. The Court reasoned that these services were supplemental and did not relieve sectarian schools of costs they otherwise would bear in educating their students. *See* 521 U.S. at 228. The Court emphasized that no funds ever reached the coffers of religious schools and reiterated that the nature of the aid remains a critical factor. *See id.* at 228, 232.

This Court's cases, therefore, have consistently held that direct financial subsidies to a pervasively sectarian school for religious education are unconstitutional. The Vermont Supreme Court's decision is in full conformance with this Court's unwavering holdings on the subject.[5]

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[5] Petitioners' reliance on the holdings in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) and *McDaniel v. Paty*, 435 U.S. 618 (1978) is misplaced. Neither of these cases even remotely dealt with the issue of the constitutionality of the government providing direct financial subsidies to pervasively sectarian schools.

III. THE VERMONT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT.

Petitioners claim that three decisions from various United States Courts of Appeals conflict with the Vermont Supreme Court's decision in *Chittenden Town Sch. Dist.* The cases cited, however, are not in conflict with the decision below. The decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), involved the provision of a full-time paraprofessional to function in a classroom for a severely disabled student, a service more akin to the provision of an interpreter in *Zobrest* and unlike the direct and unrestricted payment of tuition at issue in *Chittenden Town Sch. Dist.* *See Peter*, 155 F.3d at 994. In *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357 (1999), the Fourth Circuit held that direct funding to pervasively sectarian institutions would violate the Establishment Clause and remanded the matter to determine whether the institution was, indeed, pervasively sectarian. *See id.* at 162-63, 169. Finally, in *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the Sixth Circuit held unconstitutional a United States Army regulation prohibiting on-base family child care providers from having any religious practices during day care. The court expressly noted that there was no evidence showing that government funds were reaching these day care providers. *See id.* at 982 (government funds go "toward the administration of the program and toward other parts of the Army's comprehensive child care program"). Contrary to petitioners' contention, the holdings in these cases do not require the government to provide direct

subsidies to religious schools. Indeed, each court goes to great pains to distinguish the particular aid at issue from direct and unrestricted financial subsidies. Thus, there is no conflict and no present need to address this issue.

IV. THE RIGHT TO SEND ONE'S CHILD TO A SECTARIAN SCHOOL DOES NOT INCLUDE THE RIGHT TO HAVE THE GOVERNMENT PAY FOR RELIGIOUS EDUCATION.

Petitioners allege that the First Amendment affirmatively requires the government to pay tuition of students who attend MSJ. Courts have consistently rejected such claims. For example, in *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995), the Fourth Circuit Court of Appeals concluded that a local school board did not violate the Free Exercise Clause when it declined to pay for a speech interpreter at plaintiff's son's private sectarian school. *See id.* at 173. The Court noted at the outset that "[i]t is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.' " *Id.* at 171 (quoting *Braunfield v. Brown*, 366 U.S. 599, 605 (1961)). Relying upon this Court's decision in *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.") (citation omitted), the *Goodall* court concluded that the government's refusal to pay did not substantially impinge on plaintiffs' Free Exercise rights:

> the Goodalls have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take. Rather, they must pay for a cued speech transliterator if they decide to keep Matthew in a sectarian school and to forego the advantages offered by the public school system in Stafford County.

Id. at 172-73.

Other courts have, with the same reasoning, rejected the Free Exercise argument advanced in this action. *See, e.g., McCarthy v. Hornbeck*, 590 F.Supp. 936, 945 (D. Md. 1984) ("In essence, plaintiffs are here seeking a state subsidization of a part of the cost of sending their children to private, church-related schools. The Supreme Court has consistently held that a statute does not impinge on a constitutional right merely because it does not subsidize that right.").

The State of Vermont has done nothing to preclude any parent from sending his or her child to MSJ for religious reasons or from practicing his or her religion. The State has no obligation to subsidize a religious education. On the contrary, it is barred from doing so by the First Amendment of the United States Constitution and, as recognized in the *Chittenden Town Sch. Dist.* decision, by Chapter I, Article 3 of the Vermont Constitution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.[6]

Respectfully submitted,

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[6] The request by *Amici* that the Petition be held pending a decision in *Mitchell v. Helms*, 151 F.3d 347 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 2336 (June 14, 1999) (No. 98-1648) is unwarranted. As *Amici* readily acknowledge, *Mitchell* involves issues concerning the Establishment Clause while this case exclusively deals with free exercise and free speech questions.

STATE OF VERMONT	**RUTLAND SUPERIOR COURT**
RUTLAND COUNTY, ss	**DOCKET NO. S0478-97RcC**

CHITTENDEN TOWN SCHOOL DISTRICT,
Plaintiff,
and
CYNTHIA and DOUGLAS ANDREWS, et al.,
Plaintiff Intervenors,
v.
VERMONT DEPARTMENT OF EDUCATION, et al.,
Defendants,
and
ELIZABETH SOJOURNER, et al.,
Defendant Intervenors.

STIPULATION REGARDING FACTS OF THE CASE

For purpose of this litigation only, the undersigned parties stipulate to the facts that follow. The parties' stipulation as to the accuracy of these facts does not necessarily imply agreement as to their legal relevance.

* * *

21. Sherrie D. LaFemina chose Mount Saint Joseph's Academy for her daughter because of her religious beliefs.

22. Jason Poljacik indicated that he wished to attend MSJ, and Nancy Poljacik enrolled him there, because they believe that it was small, offered a value-based education, and had a good educational reputation.

23. The Pratts selected MSJ for their two children because they believe it to be a small, family oriented school with low student/teacher ratios, offering value-based education, strict discipline, and an excellent academic program.

24. Cynthia Andrews enrolled her son in MSJ because he wanted to attend there and because she believed that it provided a structured environment where he would receive greater individual attention, be provided with a curriculum that included consideration of values and ethics, and be treated as an individual and not as a number.

25. Robert Kirn became unhappy with the education and environment that his daughter experienced when she was enrolled in Rutland High School. Mr. Kirn enrolled her in MSJ because he felt it emphasized competence in the basics of education, offered students an opportunity to develop their own values, and stressed personal integrity and community service. As a Catholic, MSJ's Catholic basis was also very important to him.

26. After looking at other local schools, Michael Falk indicated that he wished to go to MSJ. Christine Falk

enrolled Michael and Robin in MSJ because of Michael's wishes and because she felt that the school is staffed with very approachable teachers, provides a high degree of individual attention in small classes, and offers a value-based education.

27. Tyler Tracy attended a large public school in Maine for junior high school, but, after visiting at MSJ, he requested that his father enroll him there.

28. William Tracy, a non-Catholic, enrolled his son in MSJ because of his son's request and because he felt that it provides a structured, disciplined, and caring environment that does not permit the foolishness that he believes takes place in the public schools. Mr. Tracy feels that the required study of Christianity and the Catholic Church provides information critical to the understanding of the development of Western history. He does not feel that the degree of religion present at MSJ rises to the level of indoctrination or proselytism.

* * *

54. MSJ is a pervasively sectarian institution, in that the secular and sectarian aspects of its educational program are intertwined, and the school is operated in accordance with the directives and policies of the Roman Catholic Diocese of Burlington and the State of Vermont.

* * *

83. With the exception of a few separate scholarship accounts, MSJ maintains one bank account in which it deposits all revenues, including but not limited to tuition payments, and from which it pays its operating expenses, including the costs of maintaining its physical facilities.

Other than the few scholarship accounts, MSJ does not subdivide or allocate in any way funds received; nor does MSJ separately account for sectarian related expenditures or secular educational expenditures.

* * *

IN THE SUPREME COURT

OF THE

STATE OF VERMONT

CHITTENDEN TOWN SCHOOL DISTRICT
Plaintiff/Appellant

Supreme Court
Docket No. 97-275

and

CYNTHIA & DOUGLAS ANDREWS,
et al.,
Plaintiff-Intervenor/Appellants

vs.

VERMONT DEPARTMENT OF EDUCATION,
et al.
Defendants/Appellees

and

Appeal from the
Rutland Superior Court
Docket No. S0478-96 RcC

ELIZABETH SOJOURNER, et al.,
Defendant-Intervenor/Appellees

REPLY BRIEF

OF

PLAINTIFF-INTERVENOR/APPELLANTS

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* * *

D. The Department's Attempt to Limit and Control Expression Undermines Key Constitutional Values, Structures and Relationships in Violation of the First Amendment.

As the ACLU explicitly concedes, this conflict is about whether government can control speech. ACLU-NEA Brief, 33.[21] The evolving record of this case plainly establishes that the Department controls and limits content in pursuit of its goal of controlling and limiting content. The Department's means and its ends both betray the core principles that undergird representative democracy. This is a necessary inference from the relationships created by the structure of the U.S. Constitution.

Prof. Philip Bobbitt's catalogue of the varieties of constitutional argument describes "structural arguments as inferences from the existence of constitutional structures and the relationships that the Constitution ordains among the structures of government."

> Structural arguments are largely factless and depends on deceptively simple logical moves from the entire constitutional text, rather than from one of its parts. At the same time, they embody a macroscopic prudentialism, that is,

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[21] Control is appropriate, they argue, because government "is itself acting as a speaker." *Id.*, 33-34. In fact, the neutral criteria applied in the Statute as Written ensure that any funds which get to MSJ are the " 'result of the private decision of individual parents' and '[could] not be attributed to state decisionmaking.' " Agostini, *supra*, 117 S.Ct. at 2012; *see also*, Campbell, *supra*, 161 Vt. at 455. Thus, this is a case of government controlling private speech.

> not one drawing on the peculiar facts of the case, but rather one arising from those general assertions about power and human nature we call common sense.

Bobbitt, *Constitutional Fate*, 58 Tex.L.Rev. 695, 721-22 (1980). We suggest that one classic explication of the First Amendment from a structural perspective harmonizes the interests at issue here, predicts and explains that Courts will do what they've done, and justifies the result in terms of preserving the critical values of democratic self-government. Both elements mentioned by Bobbitt – "deceptively simple logical moves from the entire constitutional text" and "general assertions about power and human nature [from] common sense" are found in Chancellor Mark Yudof's, When Government Speaks: Politics, Law & Government Expression in America, (U.Calif. 1983). Yudof argument is built on two "deceptively simple," fundamental premises about the nature of representative democracy. Both derive clearly from the constitution as a whole, rather than from any of its parts.

> First, in a representative democracy public officials must by definition represent the preferences of the majority in some sense, or at least be responsive to preferences in a procedural setting that is recognized as fair and legitimate. Second, the essence of democratic government is that autonomous, self-controlled citizens have the opportunity to make informed, intelligent judgments about government policies, free of state preceptorship that substantially impedes individual choice and consent.

Id., 152. The First Amendment was intended to protect the people's ability to inform and decide, Yudof argues,

but was focused on the specific threat perceived by the Founding Fathers from their historical perspective.

> [T]he text of the First Amendment, addressing itself to congressional abridgement of "freedom of speech" rivets attention to governmental interference with speech in the private sector. . . . This is hardly surprising, given the primitive state of mass communications in the second half of the eighteenth century. Government censorship of individual expression, particularly by the newly formed federal government, was the central speech problem of that age.

Id., 17-18. Yudof contends that courts and legal scholars have "failed to grapple with the realities of communications in the twentieth century," "concern[ing] themselves with government attempts to regulate private speech and ignor[ing] the massive role of governments in communication networks." *Id.*, xv.

> The expansion of government at all levels has increased its opportunity to communicate with the populace. . . . As government and its opportunity to communicate have expanded, so have its institutional interests as perceived by its functionaries. Inevitably, government, or those who are a part of it, seeks to persuade citizens to act, or to allow it to act differently than they would have without the information supplied by government. The transfer of information thus becomes a policy tool. The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals.

Id., 6. The Department's conduct of this case illustrates the danger. The record shows that the Department, from the time Campbell was released, has attempted to control information and manipulate results. Its seizure of Chittenden's funds violated established processes of decision. Its miscommunications of the law and facts both here and below are obvious efforts to get what it wants in the face of decisions given by law to others. Yudof argues that the First Amendment protects against these efforts by the Department to make citizens and courts "accede to government's plans policies and goals." Though directed at a specific 18th century threat,

> First Amendment principles go significantly beyond protecting the rights of individuals to express positions inconsistent with the prevailing wisdom or policies of government. Informing such democratic aspirations as majority rule and representative government are notions of informed consent of the governed and of a continuous process of consultation with the people. If the government dominates the flow of ideas and information, the ideal of the self-controlled citizen, making informed choices about his government, is destroyed. This, in turn, means that the people may be more responsive to the wishes and agenda of their leaders than the leaders are to the preferences of those whose welfare they oversee. The First Amendment then should be perceived as protecting the processes of consent – as seeking to prevent the mutilation of the independent judgment of the citizenry.

Id., xv-xvi. Yudof suggests that "concerns about government expression and the need to foster pluralism may be

treated as additional factors to be considered when individuals seek to vindicate traditional First Amendment rights." *Id.*, at 200. We urge the Court to adopt this approach.

> [P]lausible reasons justify consideration in traditional First Amendment cases of the need to limit government power to distort the citizen's judgment, falsify consent, and overwhelm other communications centers. Protection of private expression . . . enhances liberty in two senses: it affirmatively promotes the autonomy of the self-controlled citizen, and it poses obstacles to government domination of communications networks.

Id., at 201. "How should the fear of government communications excesses be factored into" traditional analysis? *Id.* Yudof suggests two considerations:

> Any judicial decision protecting the right of *private* individuals, groups, or organizations to speak strengthens their ability to communicate and increases their potential to counter government messages. . . . The structural advantages of pluralism are best achieved by strengthening all elements of private-sector communication to offset the superior ability of the government to convey its message.

Id., at 201-202.

We urge the Court to vindicate these values. It should, make clear to the Department that it has no "power to determine whether payment of tuition would offend the Establishment Clause," Campbell, *supra*, 161 Vt. at 447, with appropriate sanctions for the present incursion. Second, uphold the "entirely neutral" Statute

as Written, and the rights of all parents to make their own "genuinely independent and private" choices. *Id.*, at 454, 455.

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